IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 31.10.2006

Coram :

THE HONOURABLE MR.JUSTICE P.D.DINAKARAN

AND

THE HONOURABLE MR.JUSTICE P.P.S.JANARTHANA RAJA

Tax Case (Appeal) Nos.224 to 226 of 2003, 1093 of 2004,
295 of 2005, 548 & 549 of 2005, 1175 of 2005,
1293 to 1299 of 2005 and 2124 of 2006

Commissioner of Income Tax,
Chennai. ..Appellant in T.C(A).Nos.224 to 226 of 2003, 1093 of 2004,1293 to 1299 of 2005 1175/2005, 548, 549/2005 and 2124/2006

The Commissioner of Income Tax,
Tamil Nadu, IV, Madras. ..Appellant in T.C (A).No.295/2005.

Vs

V.C.Kuganathan, ..Respondent in T.C (A) 224/2003 and TCA.No.226/2003

A.V.M. Limited
Chennai ..Respondent in T.C (A) 225/2003

B. Suresh
58, Panmtheon Road,
Egmore Chennai 8. ..Respondent in T.C (A)1093/2004

Suchitra Mahon Lal ..Respondent in T.C (A)295/2005

S. Kamal Hasan ..Respondent in T.C (A) Nos.1293, 1294, 1295, 1296, 9297, 1298 and 1299/2005.

Mrs. Sulfath Mohammed Kutty,
No.7, Greenways Road Extention,
Raja Annamalaipuram,
Chennai 28. ..Respondent in T.C.(A).1175/2005

Suchitra Mohanlal,
No.16, Casa Major Road,
Egmore Chennai 600 008. ..Respondent in T.C (A) 548 and 549/2005

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R. B. Choudary
1, III Street,
Dr. Radhakrishnan Road,
Chennai 4. ..Respondent in T.C (A)2124/2006.

Appeals filed under Section 260A of the Income Tax Act, 1961 against the order of the Income Tax Appellate Tribunal, Madras B/A Bench, "C" Bench and "B" Bench respectively dated 30.1.2003, 14.7.2004, 21.12.2004, 17.5.2004, 26.5.2004, 10.2.2004 and 25.11.2005 in 1). ITA No.1702 & 1992/MDS/1998 Assessment year 1993 94 & 1992-93

2. ITA.No.1181/MDS/1998. Assessment year 1991-92.

3. ITA.No.1922/M/97 Assessment year 1993-94.

4. ITA.No. 114/Mds/1999

5. ITA.No.217, 218, 219 & 220/MDS/97, 42/MDS/98, 1496/MDS/2000 and 1276/MDS/2001 Assessment year 1992-93 1993-94 1994-95 1995-96 1997-98 & 1999 -2000.

6. ITA.No.1548/mds/1999. Assessment year 1996-97

7. ITA.No.413/Mds/1997 & 414/Mds/1997 and

8. ITA.No.118/Mds/2002. Assessment year 1994-1995 respectively.

For Appellant in all the T.C.(A)'s : Mrs.Pushya Sitaraman, Sr.Standing Counsel for Income-tax Department

For Respondent in T.C.(A) Nos.224 and 226 of 2003 : Mr.R.Subramanian, Sr.Counsel for Mrs.S.Hemalatha

For Respondent in T.C.(A) No.225 of 2003 : Mr.Venkat Narayan

For Respondent in T.C.(A) No.1093 of 2004 : Mr.V.D.Gopal

For Respondent in T.C.(A)Nos.295 of 2005, 548 & 549 of 2005, 1175 of 2005 : Mr.Trilokchand Chopda

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For Respondent in
T.C.(A) Nos.1293 to : Mr.V.Ramakrishnan
to 1299 of 2005

COMMON JUDGMENT
(Judgment of the Court was delivered by
P.P.S.Janarthana Raja, J.)

The present appeals are filed under Section 260A of the Income Tax Act, 1961 by the Revenue against the orders passed by the Income Tax Appellate Tribunal, Madras. The issue involved is common for all the tax cases and hence the counsel appearing for both the sides requested the Court to take up all the above matters together. Accordingly, all the matters are taken up together and the same are disposed of, by a common judgment.

2. The questions of law raised in the above appeals are as under:

a) Tax Case (A) Nos.224 to 226 of 2003, 1093 of 2004, 1293 to 1299 of 2005, 1175 of 2005:

> "Whether in the facts and circumstances of the case, the Tribunal was right in treating the transfer of the right to exhibit the films, as a sale of goods or merchandise for the purpose of deduction under Section 80HHC?"

b) Tax Case (A) No.295 of 2005:

> "Whether on the facts and circumstances of the case the Appellate Tribunal was right in law in holding that, the right of exploitation of the films outside India do constitute export of goods or merchandise and consequently the assessee would be entitled to deduction under Section 80HHC of the Income-tax Act is valid?"

c) Tax Case (A) No.548 and 549 of 2005:

> "1. Whether on the facts and in the circumstances of the case, the Income Tax Tribunal is right in law in holding that the assessee was entitled to relief under Section 80HHC since in the case of lease of film rights for exhibition in foreign countries would tantamount to export of goods and merchandise?
> 2. Whether on the facts and in the circumstances of the case, the Income Tax Tribunal is right in law in holding that the assessee was entitled to relief under 80HHC especially what was transferred was only a right to exploit the films and there was no goods merchsndised or exported?

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3. Whether on the facts and in the circumstances of the case, the Income Tax Tribunal is right in law in granting the relief under 80HHC since only a lease agreement was entered for a limited period of five years and not a outright sale?

4. Whether on the facts and in the circumstances of the case, the Income Tax Tribunal is right in law in holding that 80HHC relief is to be granted inspite of the fact that in the lease agreement, as per clause 7, after a period of five years, the prints are to be destroyed, which would clearly show that only right to exploit was given adn there was no goods merchandised or exported?"

d) Tax Case (A) No.2124 of 2006:

"Whether, in the facts and circumstances of the case, the Tribunal was right in treating the lease of the right to exhibit the films for a limited period, as a sale of goods or merchandise eligible for the purpose of deduction under Section 80HHC?"

3. For the same of convenience, we are taking up the Tax Case (A) No.224 of 2003, in which the question of law reads as under:

"Whether in the facts and circumstances of the case, the Tribunal was right in treating the transfer of the right to exhibit films, as a sale of goods or merchandise for the purpose of deduction under Section 80HHC?"

The brief facts leading to the above question of law are as under:

The assessee is engaged in the film business. He held the rights over the film "Mudal Kural". The relevant assessment year is 1993-94 and the corresponding accounting year ended on 31.03.1993. The assessee filed Return on 07.01.1994 admitting an income of Rs.57,950/-. The Return was processed under Section 143 (1)(a) of the Income-tax Act (hereinafter referred to as the "Act"). Later, the Assessing Officer issued notice under Section 143(2) of the Act. Subsequently, assessment was completed under Section 143(3) of the Act, determining a total income of Rs.1,15,980/-. While completing the assessment, the Assessing Officer disallowed the deduction claimed by the assessee under Section 80HHC of the Act. Aggrieved by the order, the assessee filed an appeal to the Commissioner of Income-tax (Appeals). The C.I.T.(A) allowed the appeal and was of the view that the assessee is entitled to the relief under Section 80HHC of the Act. Aggrieved, the Revenue filed an appeal to the Income-tax Appellate Tribunal (hereinafter referred to as the "Tribunal"). The Tribunal

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dismissed the Revenue's appeal and confirmed the order of the C.I.T.(A).

4. Learned Standing Counsel appearing for the Revenue submitted that for the purpose of claiming deduction under Section 80HHC of the Act, there should be transfer of goods or merchandise from India to outside India. In the present case, there is only an agreement by which, only the right to exploit was transferred, but there is no export of goods or merchandise. It is also further submitted that Section 80HHC of the Act, clearly stipulates that the sale proceeds of such goods must be brought into India. The word "sale proceeds" means, there should be only actual export sale. In this case, there is no sale of goods and hence the assessee is not entitled to relief under Section 80HHC of the Act.

5. Learned Senior counsel appearing for the assessee submitted that the word "goods" or "merchandise" has not been defined in the Act and hence the meaning of these words have to be understood either from Dictionary or from other Acts. The Dictionary meaning of the word "good" is immovable property, chattels, merchandises, freight (Oxford Dictionary). He also further stated that the word "goods" means not only tangible assets, but also intangible assets. It is also further submitted that under the Sale of Goods Act, 1930, the term "goods" means every kind of movable property stocks and shares, growing crops, grass and things attached to or forming part of the land which are agreed to be served before sale or under the contract of sale. It is therefore, contended that there is nothing in the above definition to exclude film prints (together with the rights) from the purview of the term 'goods' and relied on the Bombay High Court judgment reported in 267 ITR 488 in the case of Abdulgafar A.Nadiadwala Vs. Assistant Commissioner of Income-tax and Others and Supreme Court judgment reported in 271 ITR 401 in the case of Tata Consultancy Services Vs. State of Andhra Pradesh, to support his contention.

6. Heard the counsel. It is seen from the order of the Tribunal that the Departmental Representative appearing for the Revenue before the Tribunal, relied on the decision of the Tribunal (Mumbai Bench-B) in Abdulgafar A.Nadiadwala Vs. Dy.CIT (2000) 75 I.T.D. 395. In that case the assessee had transferred the telecasting of films for a limited period to Star TV, a foreign enterprise. The question was whether such transfer could be said to amount to sale of goods or export of goods or merchandise out of India. The Tribunal held that it was not sale of goods and therefore no export was carried out and accordingly, deduction under Section 80HHC of the Act was denied. Aggrieved by the order, the assessee filed an appeal to the Bombay High Court. The Bombay High Court considered the scope of Section 80HHC of the Act and allowed the assessee's appeal. The said Bombay High Court judgment is now reported in 267 ITR 488. The contentions raised before the

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Bombay High Court by the counsel is at Page No.508 of the said judgment and the same reads as follows:

> "Points for determination:
>
> The substantial points for determination, in a narrow compass, on rival contentions as between the parties canvassing rival views, on the facts and circumstances of the case, are as under:
>
> 1. Whether the product involved can be said to be "goods" and/or "merchandise"?
>
> 2. If yes, can it be said that it was exported out of India by way of sale or otherwise involving clearance at the customs station?
>
> 3. If yes,whether the consideration received can be described as sale proceeds constituting part of export turnover?"

In respect of first point, the Bombay High Court held as follows:

> "Having given our anxious consideration to all the factors referred to hereinabove, the transaction in question, whereby the assessee had purchased the rights of various decoders and had recorded on beta-cam tape and entered into an agreement with the Star TV for transfer of telecasting rights for Asian region for a period of five years, can conveniently be described as article or thing falling within the sweep of the word "goods" or "merchandise". We, therefore, hold that the beta-cam tape, which has incorporeal rights, is a "goods" or "merchandise" for the purposes of section 80HHC of the Act."

In respect of second point, the Bombay High Court held as follows:

> "Having taken the survey of various provisions, one fails to understand as to why the word "otherwise" should not cover within its sweep such types of transactions and, if such types of transactions are taken into account, then they would be nothing but sale for the purposes of section 80HHC. We, thus, hold that the transaction in question involved export of goods out of India falling within the sweep of the concept of "sale" involving clearance at the customs station as contemplated under section 80HHC of the Act."

In respect of third point, the Bombay High Court held as follows:

> "Reading of the above illustrations in general and clauses (v) and (vi) thereof in particular make it clear that while describing the deduction under section 80HHC the words used

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> are 50 per cent of the "export proceeds" brought into India. It is, therefore, clear that even the Central Board of Direct Taxes has understood the words "export proceeds" to be synonymous to "sale proceeds". If that be so, the amount received by way of consideration in the transaction in question can conveniently be termed as "export proceeds" equal to that of "sale proceeds". Once we hold that the transaction involved in this case is akin to "sale" falling within the sweep of the words "sale or otherwise" then the consideration i.e., export proceeds received can be termed as "sale proceeds".

Finally, the Bombay High Court considered the above contentions in detail and held as follows:

> "In the above view of the matter and following the well recognised principles of interpretation reiterated from time to time and adopting purposive interpretation keeping in mind the practical common sense approach and commercial expediency we have reached the conclusion that the transaction involved in this appeal, on the facts and circumstances of the case, is well within the sweep of section 80HHC of the Act and all the authorities below were not justified in denying the deduction to the claim of the assessee under section 80HHC in the sum of Rs.84,23,746 in respect of export of beta-cam tapes as per agreement dated March 29, 1995. We, thus, hold that the assessee is entitled to such deduction under section 80HHC of the Act and allow the appeal on this count. Accordingly, we answer the question in favour of the assessee and against the Revenue on this count."

We have gone through the judgment of the Bombay High Court and we find that the facts including the contentions of the counsel in the Bombay High Court judgment are same, identical and similar to the facts involved in the present case. The counsel for the Revenue, neither produced any material or evidence, nor shown any other High Court judgment, taking a contrary view of the Bombay High Court. Further, no compelling reasons were given by the Revenue to take a different view of the Bombay High Court and hence, we respectfully agree with the view taken by the Bombay High Court. Further, we note that the contentions of the counsel are also well supported by the Apex Court judgment reported 271 ITR 401, in the case of Tata Consultancy Services Vs. State of Andhra Pradesh. In that judgment, the Supreme Court considered the scope of the word "goods" and held as follows:

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> "It is not in dispute that when a programme is created it is necessary to encode it, upload the same and thereafter unloaded. Indian law, as noticed by my learned Brother, Variava J., does not make any distinction between tangible property and intangible property. A "goods" may be a tangible property or an intangible one. It would become goods provided it has the attributes thereof having regard to (a) its utility; (b) capable of being bought and sold; and (c) capable of being transmitted, transferred, delivered, stored and possessed. If a software whether customized or non-customized satisfies these attributes, the same would be goods. Unlike the American courts, Supreme Court of India have also not gone into the question of severability."

Applying the abovesaid principles, we are of the view that exporting the right for exhibition of positive print is nothing but sale of goods or merchandise.

7. Under these circumstances, we are of the view that the assessee had satisfied the conditions contemplated under Section 80HHC of the Act and hence the assessee is entitled for the deduction under Section 80HHC of the Act.

8. In view of the foregoing reasons, we answer the questions of law in favour the assessee and against the Revenue in all the tax cases. Accordingly, the tax cases are dismissed. No costs.

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Sd/
Asst.Registrar

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Sub Asst.Registrar

To

1. The Asst Registrar,
Income Tax Appellate Tribunal,
A/B Bench, 'B' Bench, and 'C' Bench
Rajaji Bhavan, Besant Nagar, Chennai 600 090.

2. The Secretary
Central Board of Direct Taxes,
New Delhi.

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3. The Commissioner of Income Tax,
Appeals X, Chennai

4. The Commissioner of Income Tax,
Tamilnadu IV, Chennai

5. The Income Tax officer,
Film Ward I, Chennai

6. The Assistant Commissioner of Income Tax,
Film Circle, Chennai.

7. The Commissioner of Income Tax,
Chennai.

8. The Deputy Commissioner of Income Tax,
Film Circle, Chennai 6.

9. The Deputy Commissioner of Income Tax,
Special Range XI, Chennai.

10. The Income Tax Officer,
Film Ward II, Chennai.

11. The Deputy Commissioner of Income Tax,
Madia Circle 1/11 Chennai.

+ 8 ccs to M/s. Pushya Sitaraman Sr. Standing Counsel for IT
SR.Nos.51313, 51314, 51315, 51316, 51317, 51318, 51319, 51320

+ 2 ccs to Mr. T. Pramod Kumar Chopda, SR Nos. 51401, 51402

+ 1 cc to Mr. V. D Gopal Advocate SR No. 51394

+ 1 cc to Mr. R. Venkatnarayanan, Advocate SR No. 51468

+ 1 cc to Mr. V. Ramakrishnan, Advocate SR No. 51255

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Tax Case (A) Nos.224 to 226
of 2003, 1093 of 2004,
295 of 2005, 1293 to 1299
of 2005, 1175 of 2005,
548 and 549 of 2005,
2124 of 2006.

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